APPENDIX

APPENDIX A

Opinions and Mandate Below

BEFORE THE
DEPARTMENT OF MOTOR TRANSPORTATION
FRANKFORT, KENTUCKY

Docket No. 205

In the Matter of:

PETITION FOR REVIEW AND APPEAL BY BLUE MOTOR COACH LINES RELATIVE TO EXTENDED SERVICE AND NEW SCHEDULES BY LOUISVILLE RAILWAY CO.

Final Order

The Recommended Report and Order in this cause having been filed, and copies thereof having been served upon each of the parties participating in the hearing, and the exceptions and replies thereto having been duly served, filed and considered, and oral argument having been heard herein, and the Commissioner being fully advised;

IT IS HEREBY ORDERED that the Recommended Report and Order, as filed by J. Carl Rosskopf, Examiner, on the 14th day of June, 1951, be, and the same is hereby, approved only insofar as it agrees with this Final Order; and the appeal of Blue Motor Coach Lines, as filed on February 6, 1951, is hereby dismissed; and the petition for review and appeal, as filed by Blue Motor Coach Lines on February 8, 1951, is also hereby dismissed. The protest of the Louisville Transit Company to the issuance of the 1951 "restricted" city bus certificate to Blue Motor Coach Lines is also hereby dismissed.

On June 30, 1950, by Ordinance No. 179, Series 1950, the City of Louisville, hereinafter referred to as City, annexed a certain area commonly referred to as Camp Taylor. At the time of the passage of this ordinance, and prior thereto for a number of years, Blue Motor Coach Lines, hereinafter referred to as Blue Motor, in operating Common Carrier

Bus Certificates Nos. 46, 47, 48, 179 and 477, had operated into the City from various points outside of same; and in so doing had furnished bus service to the residents of the Camp Taylor area, such operation being fully in accordance with Blue Motor's operating authority as granted by the Department of Motor Transportation, hereinafter referred to as Department. It should be noted that the service rendered by Blue Motor was not an intra-city service as far as the City was concerned, its operating in the City being restricted to the picking up of passengers destined for points outside of the then existing corporate limits of the City and the discharging of passengers who had ridden into the City from points in the Camp Taylor area or from other points on inter-city routes served by Blue Motor.

The City, at the time of the passage of the above noted ordinance, was receiving city-wide bus service from the Louisville Transit Company, hereinafter referred to as Transit; and on January 28, 1951, Transit, with the approval of the Director of the Traffic Engineering Department of the City, extended its city-wide service to include the recently annexed Camp Taylor area. Thereafter, on February 6, 1951, Blue Motor, in accordance with K.R.S. 281.635(3), filed an appeal to the Department from the action of the City in granting Transit the right to operate in the Camp Taylor area. Also, on February 8, 1951, Blue Motor filed with the Department a petition for review and appeal of the action of the City in permitting Transit to operate in the Camp Taylor area and further requested that Transit be required to cease and desist its operation. On or about February 26, 1951, Blue Motor filed suit in the Franklin Circuit Court against Transit and others; but defendant's plea to the jurisdiction was sustained, and plaintiff took no appeal. Both the City and Transit immediately filed responses to the protest of Blue Motor, and Transit also protested the issuance by the Department of a 1951 restricted city bus certificate to Blue Motor. Following statutory notice, a hearing was held on April 30, 1951, J. Carl Rosskopf, Examiner, presiding. The learned Examiner's Recommended Report and Order was issued on June 14, 1951, his report recommending, in essence

that both Transit and Blue Motor be permitted to continue their operation in the Camp Taylor area. In accordance with statutory procedure, all parties excepted to the Recommended Report and Order and then replied to the exceptions. This was the status of the record and the facts as submitted to the Commissioner for the Final Order of the Department. Thereafter, on December 31, 1951, the Commissioner set the matter for oral argument on January 17, 1952, at which time all parties appeared, either in person or through their attorneys, and orally presented their cases.

As noted in the facts, this matter originally arose as an appeal by Blue Motor, under K.R.S. 281.635(3), from the action of the City in authorizing Transit to operate in the Camp Taylor area. However, upon an initial attempt to decide the matter, it readily becomes apparent that there is more than one issue involved and that this is indeed a most unusual and perplexing matter. To be specific, there is first the issue raised by Blue Motor's operation of a city bus service without possessing a franchise from the City authorizing same. Second, the issue of whether Transit had the right under its city franchise to extend its service into the annexed area; this also giving rise to the questions of whether the city bus certificate as previously issued Transit by the Department was automatically extended to include the annexed area, or whether Transit should have proved public convenience and necessity and the other factors required by K.R.S. 281.630(1) before it began its Camp Taylor operation. In addition, Transit has raised the question of the validity of certain restricted city bus certificates issued to Blue Motor by the Department, contending that Blue Motor was not entitled to be grandfathered into same.

Before attempting to make a determination of these issues it should be noted that it is fundamental that both Blue Motor and Transit are motor carriers, as defined by K.R.S. 281.010(12), and, as such, come within the jurisdiction of the Department and are required by K.R.S. 281.615 to obtain a certificate of public convenience and necessity from the Department before beginning any operation. Furthermore, as motor carriers they are subject

to the provisions of Chapter 281 of the Kentucky Revised Statutes, which was enacted in 1950 as Acts 1950, Chapter 63, and became effective June 15, 1950.

Since this matter was instituted by Blue Motor's appeal, let us first attempt to determine the validity of Transit's operation in the Camp Taylor area. It is necessary to note that prior to June 15, 1950, the effective date of the new Motor Carrier Act, Transit's city operation was regulated by the Public Service Commission of Kentucky, and Transit held no city certificate of public convenience and necessity from the Department. On December 29, 1950, several months after the effective date of the Act, Transit applied for a 1950 city bus certificate which was issued pursuant to K.R.S. 281.665(1). This certificate, in accordance with K.R.S. 281.665(1), was based on the grandfathering of Transit's operation as of December 31, 1949, and was renewed on January 1, 1951. Neither at the time of issuance of either of these city bus certificates, nor on December 31, 1949, was Transit rendering any type of bus service in the Camp Taylor area. Therefore when on January 28, 1951, Transit initiated service in the Camp Taylor area, such was the institution of an entirely new service—i.e., one which was not grandfathered. There is no question but that Transit's operation of a city bus service in the Camp Taylor area must be conducted pursuant to a certificate of public convenience and necessity as issued by the Department. The only such certificate possessed by Transit which could be construed applicable to the Camp Taylor operation was the 1951 city bus certificate. However, as previously pointed out, this certificate was one originally issued under a grandfathering statute based on operation as of December 31, 1949; and Transit has never applied to the Department to amend or extend this certificate to include and authorize operation in the newly annexed area. Thus arises the issue of whether or not a city bus certificate is automatically extended by annexation to permit operation in the annexed area or whether Transit should have proven the factors required by K.R.S. 281.630(1). The determination of these issues must lie in the Motor Carrier Act, and a study of it reveals several items of interest.

First, authority to operate as a city bus is defined as a city bus "certificate" and referred to a "regular route operation", see K.R.S. 281.010(13)(a). The Legislature, in using such terms as "certificate" and "regular route operation", thereby declared a city bus operation to be of a common carrier nature, rather than a contract carrier, see K.R.S. 281.010(4), K.R.S. 281.010(10) and K.R.S. 281.010(11). Secondly, if such operation is that of a common carrier, there are decisions too numerous and well recognized to be cited here supporting the established rule that a common carrier shall operate only over its authorized routes and, in order to amend its certificate to include additional routes, must prove public convenience and necessity over same. This was recognized by the Legislature in enacting K.R.S. 281.630(1), K.R.S. 281.630(6) and K.R.S. 281.700(1). However, it must be remembered that a city bus certificate, as defined by K.R.S. 281.010(13)(a) and as issued by the Department, authorizes service to all points within the corporate limits of the city, the routes over which such service is rendered being determined by the governing body of the city. K.R.S. 281.635(3) provides for an appeal to the Department from any action, finding or order of any such city. Thus, the Motor Carrier Act seemingly places a city bus operation in the common carrier category but permits certain laxity as regards the regular route aspect, in that the certificate of public convenience and necessity as issued by the Department authorizes city-wide operation over routes designated by the city from time to time as conditions warrant. The Department has never attempted to initially determine the routes in a city operated by the city bus, and no city bus operator has ever attempted to prove public convenience and necessity on any basis other than a city-wide one.

Transit has contended that the mere fact that the new area to be served lies within the corporate limits of a city is sufficient to indicate public convenience and necessity, and that since K.R.S. 281.635(3) gives a city primary regulatory power over city bus routes, a city bus certificate, as issued by the Department, is automatically extended by annexation to permit operation over the new city streets, regardless of the presence of other motor carriers in the

annexed area. To further support this, Transit cites a number of cases holding that upon annexation all roads passing through Camp Taylor became streets of the City. The Commissioner fully agrees with these cases but does not feel that they are in any manner decisive of this issue, since such a holding does not also decide in any degree the present issue of automatic extension of a city bus certificate.

Extension of its City franchise upon annexation is another contention which is made by Transit to support its operation in the annexed area. In this respect Transit cites *Truesdale* v. *City of Newport*, 28 KLR 840, 90 S.W. 589, in which case the Court of Appeals in 1906 held that a gas franchise in the City of Newport automatically extended to an area subsequently taken into the City. Although the Commissioner feels that the Truesdale case, supra, can easily be distinguished from the present case, in that there was no other gas company serving that area subsequently taken into the city, he does not think such is necessary; for regardless of whether the franchise automatically extends, the question remains as to the automatic extension of the city bus certificate, this certificate being just as necessary to a valid city bus operation as is the city franchise.

It should be noted at this point that the exercise by a city of its statutory power of annexation is in no wise similar to the determination of whether or not public convenience and necessity exist in an area. For example, it is entirely possible that a city may annex an area, a large proportion of which is sparsely settled and rural in nature and which would not be capable of sustaining any type of city bus service. In fact, the Department has previously had several instances in which city bus operators have not desired to render suburban bus service to areas adjacent to the city because there was not a need for bus service sufficient to sustain same. Should such an area be annexed, would it be reasonable to conclude that the existing city bus operation must serve it simply by virtue of the act of annexation? Furthermore, to cause extension of city bus service into an area in which public convenience and necessity does not exist and to require service in the area

simply because it has been annexed could have a disastrous effect upon the carrier's rate structure, in that the additional expense of operation would not be offset by increased revenue, and, therefore, rates would have to be increased to continue the fair return permitted by law. Of course not all annexed areas would be of this type, but such cases could arise. But as previously noted herein, K.R.S. 281.635(3) provides for an appeal to the Department from any order or finding of a city. Therefore, in the event that an area was annexed which was not conducive to economic bus service and the city called upon the existing city bus company to render such service, the carrier could appeal to the Department by virtue of the above noted statute. The final determination of the matter would vest in the Department and would be tantamount to a determination of public convenience and necessity, since the Department would have to find whether or not a need existed for the service over the routes which the city requested the carrier to serve.

The adoption of this theory of automatic extension of city bus service upon annexation would be entirely proper and in keeping with the present statutory law relative to this matter, but would it also solve the present issue involving the extension of city bus service into an area presently served by another carrier under certificates acquired prior to annexation? The Commissioner is of the opinion that automatic extension of a city bus certificate because of annexation is entirely proper under the present Motor Carrier Act and is required of the city bus operator, Transit in this case, unless under an appeal pursuant to K.R.S. 281.635(3) the Department rules otherwise; such automatic extension being proper and required regardless of whether or not a carrier, such as Blue Motor in this case, is presently rendering what amounts to city bus service in the newly annexed area. The reason for this conclusion arises from an aspect of this case which has not been previously mentioned—namely, the interest of the bus riding public as regards the furnishing of an integrated city-wide city bus service. Regulation of motor carriers has as its fundamental concept the interest of the bus riding public, and in any case involving a balancing of

interests between carriers, the Commissioner is of the opinion that this factor should be the decisive and controlling one. If in this case it should be decided that Transit could not serve the annexed area because of the presence therein of a former suburban carrier, Blue Motor, the ensuing result would be that the City would be served by two bus companies instead of one. This would result in many problems directly affecting the bus riding public. One of these would be the difficulty of maintaining adequate schedules upon the part of both carriers in order that bus riders would not be delayed in the resulting transfers necessary when one desired transportation from the annexed area served by one carrier to a point within the original corporate limits served by the other carrier. Additional problems concerning the honoring of the other carrier's transfers, the differences in rates due to variances in rate structure, etc., would not only adversely affect the public, but would also enlarge the administrative problems of both the City and the Department. Therefore, when considered in light of what is best for the interest of the bus riding public of the City, and particularly since the Motor Carrier Act permits same, the Commissioner finds that the 1951 City Bus Certificate as issued by the Department to Transit was automatically extended to permit legal operation of Transit in the annexed Camp Taylor area.

The question of extension of the City franchise is, in the opinion of the Commissioner, a matter which lies between the City which issued same and Transit. Seemingly, the City has approved extension of its franchise, since it approved Transit's operation in the Camp Taylor area. Furthermore, it is doubtful that this Department has jurisdiction in such a matter.

Attention must now be given to the present operation of Blue Motor within the annexed area. In so doing, there arises certain of the issues as previously noted herein. These are the contention of Transit as to the correctness of the issuance by the Department to Blue Motor of certain city bus certificates and the failure of Blue Motor to possess a franchise from the City. Before discussing the propriety of the city bus certificates, it should be clearly

brought out that such certificates, as issued, are restricted in that they do not permit operation throughout the entire City, but only provide for operation in the annexed area. Furthermore, a careful study of such restrictions will conclusively show that they permit no basic operation other than that validly engaged in by Blue Motor on June 15, 1950, said date being the effective date of the new Motor Carrier Act and also being prior to the date of annexation.

Careful consideration will also show that were it not for the occurrence of the passage of the new Motor Carrier Act and the annexation of the Camp Taylor area, Blue Motor, in order to lawfully operate in 1951, would have simply renewed its 1950 bus certificate. Thus, if no annexation had occurred, Blue Motor should have carefully analyzed its operation in light of the new Act in order to determine what was the new statutory designation of the bus operation it was conducting and applied in 1951 for the correct type of certificates. These certificates would have been issued without a hearing, since K.R.S. 281.665(2) provided for grandfathering of such authority. The Legislature realized in passing the new Motor Carrier Act that it was creating certain new and different designations for varying types of motor carrier authority and, therefore, in enacting K.R.S. 281.665(2), permitted the Department to change designations of previously granted operating authorities without a hearing. Therefore, Blue Motor, having possessed prior to June 15, 1950, (the date set forth in K.R.S. 281.665(2)) the authority to operate in the Camp Taylor area, would have applied for renewal of same, asking for a certificate bearing the new statutory designation which fitted the operation, such probably being a suburban bus certificate. However, when renewal time arrived Blue Motor was rendering an operation in an area which had been annexed into the City; and, therefore, the proper statutory designation was a city bus operation, restricted as was done herein. It should be noted that such annexation occurred after the effective date of the new Motor Carrier Act. It is contended by Transit that Blue Motor could not, by virtue of K.R.S. 281.665(2), be grandfathered into a city bus certificate, primarily due to the fact that on June 15, 1950, Blue Motor did not possess

authority to transport passengers for hire within the corporate limits of the City. This is true in one sense only, since Blue Motor did possess proper authority to operate in the Camp Taylor area which on June 15, 1950 was not part of the City.

As has been previously stated, Blue Motor was for a number of years picking up and discharging passengers along various routes in the Camp Taylor area, such operation being conducted in accordance with the various motor carrier laws and rules and regulations. Upon annexation Blue Motor has continued operating just as it did prior to same and has not attempted to increase or decrease the area served. All it attempted to do in so operating and in its renewed application was to seek to continue picking up and discharging passengers along the routes it served. In so doing, it was merely carrying out its duty to render service, a duty which the motor carrier law required it to assume when it initially proved public convenience and necessity and started serving the route or routes. The Department, in issuing the 1951 restricted city bus certificate to Blue Motor, did so upon the basis that Blue Motor had previously lawfully obtained the authority to render bus service in the Camp Taylor area, regardless of what statutory designation was given the operation by the new Motor Carrier Act. The Commissioner does not deem it necessary in this instance to determine the exact basis of Blue Motor's authority to so operate—i.e., whether it be a property right or mere privilege, etc., but would like to point out that even though it should be a mere privilege, it is a privilege which does not belong to all persons by common right, since to obtain it one must prove the factors required by K.R.S. 281.630(1) which include public convenience and necessity, that the applicant is fit, willing and able and that the existing transfer service is inadequate. Furthermore, it is in many cases a very valuable privilege when considered in light of its value in dollars and cents. To have refused to issue the present restricted city bus certificate to Blue Motor merely because of annexation would have been a complete extinguishing of Blue Motor's authority to serve the Camp Taylor area, and the Commissioner is of the opinion that the restricted city

bus certificate issued to Blue Motor was issued properly in accordance with the law.

The only remaining issue concerns the fact that Blue Motor is conducting a city bus operation within the corporate limits of the City without possessing a franchise in accordance with Section 163 and 164 of the Constitution of Kentucky. Although the Commissioner fully realizes that it is his duty and the duty of every member of the Department to uphold all of the provisions of the Constitution of Kentucky, he feels that due to the peculiar facts and circumstances of the present matter, in that Blue Motor has applied to the City for a franchise, but no action has been taken on such application, that the absence of a franchise in the present case is a matter which lies between the City and Blue Motor and is similar in theory to the previously discussed matter concerning the extension of Transit's city franchise. Therefore, the Commissioner does not rule upon this issue.

Therefore, the appeal of Blue Motor to the Department from the action of the City in granting Transit the right to operate in the Camp Taylor area, the petition for review and appeal from the action of the City in permitting Transit to operate in the Camp Taylor area and the protest of Transit to the issuance by the Department of a restricted city bus certificate to Blue Motor are each hereby dismissed in accordance with the findings and conclusions as set forth above.

UNDER MY HAND this, the 5th day of March, 1952.

/s/ JOHN M. KINNAIRD
John M. Kinnaird
Commissioner

FRANKLIN CIRCUIT COURT

Filed Oct. 2, 1953

KELLY C. SMITHER
Clerk Franklin Circuit Court

No. 44447

RAY WHITAKER AND HARRY L. SWAIM, d/b/a BLUE MOTOR COACH LINES, *Appellants*

v.

LOUISVILLE TRANSIT COMPANY, CITY OF LOUISVILLE, AND DEPARTMENT OF MOTOR TRANSPORTATION, *Appellees*

No. 44450

CITY OF LOUISVILLE, *Appellant*

v.

DEPARTMENT OF MOTOR TRANSPORTATION, JOHN M. KINNAIRD, Commissioner of Motor Transportation, RAY WHITAKER AND HARRY L. SWAIM, d/b/a BLUE MOTOR COACH LINES, AND LOUISVILLE TRANSIT CO., *Appellees*

No. 44451

LOUISVILLE TRANSIT COMPANY, *Appellant*

v.

DEPARTMENT OF MOTOR TRANSPORTATION, JOHN M. KINNAIRD, Commissioner of Motor Transportation, RAY WHITAKER AND HARRY L. SWAIM, d/b/a BLUE MOTOR COACH LINES, AND CITY OF LOUISVILLE, *Appellees*

Order and Judgment

The above styled appeals from the Department of Motor Transportation (hereinafter called the Department), having been consolidated and heard upon the record before the Department, filed in action No. 44447; the Department and Harry L. Swaim and Ray Whitaker, d/b/a Blue Motor Coach Lines (hereinafter called Blue Motor), each having

filed a motion to dismiss the appeal in actions Nos. 44450 and 44451; the Department and Blue Motor each having filed a general demurrer in actions Nos. 44450 and 44451; the Department having filed a general demurrer in action No. 44447 and Louisville Transit Co. (hereinafter called Transit), having filed a special demurrer in action No. 44447; answers having been filed in each of the consolidated actions; the special demurrer and the general demurrers having been passed to the merits; said actions having been submitted in open court for judgment upon briefs on the motions to dismiss and the merits; and the Court having considered the pleadings, the record herein, the briefs and argument of Counsel, it is hereby ordered and adjudged as follows:

1. Blue Motor's motion and the Department's motion to dismiss Transit's appeal in action No. 44451 is each overruled.

2. Blue Motor's motion and the Department's motion to dismiss Louisville's appeal in action No. 44450 is each overruled.

3. Blue Motor had no right to engage in intracity transportation of passengers for hire in the Camp Taylor area of Louisville, which area was annexed and became a part of Louisville on June 30, 1950. The Department erroneously issued to Blue Motor City Bus Certificate No. 800, which purported to authorize Blue Motor to engage in intracity transportation of passengers for hire in the said Camp Taylor area of Louisville. The Department erroneously held that Blue Motor was entitled to continue to hold such certificate and to engage in such transportation. A franchise from Louisville was, and is, a prerequisite under both the Kentucky Constitution and the Kentucky Statutes to engage in such intracity transportation. Blue Motor held no such franchise and said certificate was and is void and all operations thereunder were and are illegal.

WHEREFORE, it is ordered and adjudged:

(a) That said City Bus Certificate No. 800 and any renewal thereof be and the same is hereby set aside,

cancelled and held for naught and Blue Motor is ordered and directed immediately to surrender said certificate to the Department for cancellation and immediately to discontinue any and all intracity transportation of passengers for hire in Louisville over any of the routes specified in said City Bus Certificate No. 800.

(b) That Louisville Transit Co. recover of Blue Motor its costs expended in connection with action No. 44451.

(c) The City of Louisville recover of Blue Motor its costs in connection with action No. 44450.

4. The Department correctly held that Louisville Transit Co.'s franchise from Louisville and its City Bus Certificate No. 733 issued by the Department, automatically extend to the newly annexed Camp Taylor area of Louisville, and Transit was and is, by reason of such franchise and City Bus Certificate, authorized to engage in the intracity transportation of passengers for hire in said Camp Taylor area of Louisville which was annexed by and became a part of Louisville on June 30, 1950.

WHEREFORE, it is further adjudged that the Petition of Appeal filed by Blue Motor in action No. 44447 be, and same is hereby dismissed and Louisville Transit Co. and the City of Louisville are each entitled to recover from Blue Motor their costs expended in said action No. 44447. To all of which Blue Motor excepts and prays an appeal to the Court of Appeals, which is granted. The department excepts to paragraphs #1, #2, #3 of this judgment and prays an appeal to the Court of Appeals, which is granted.

Entered this 2d day of October 1953.

/s/ W. B. ARDERY
Judge

RAY WHITAKER et al., d/b/a Blue Motor Coach Lines, *Appellant,*

v.

LOUISVILLE TRANSIT COMPANY, the City of Louisville, and the Department of Motor Transportation, Commonwealth of Kentucky, *Appellees.*

Court of Appeals of Kentucky.

June 25, 1954.

As Modified on Denial of Rehearing Dec. 17, 1954.

Further Modification Jan. 10, 1955.

William A. Young, Harry McChesney, Jr., Robert H. Kinker, and Robert M. Pearce, Frankfort, for appellant.

John E. Tarrant, Earl S. Wilson, S. M. Russell, Alan N. Schneider, Louisville, J. J. Leary, Louis Cox, and George M. Catlett, Frankfort, for appellees.

COMBS, Justice.

The respective rights of Blue Motor Coach Lines and the Louisville Transit Company to maintain bus service in the Camp Taylor area of Louisville are in issue. The state Department of Motor Transportation held that both companies had the right to render such service. The circuit court held that the Louisville Transit Company had such right but that Blue Motor Coach Lines did not. Blue Motor has appealed. The City of Louisville, as one of the appellees, has filed a brief in which it is argued, in effect, that the judgment should be affirmed.

Blue Motor, since 1935, has maintained bus service between Camp Taylor, a suburb of Louisville, and the downtown section of the city, under a certificate of convenience and necessity issued first by the State Tax Commission and later by the State Department of Motor Transportation. No question is raised about the authority of Blue Motor to render such service prior to June 30, 1950. On that date the City of Louisville formally annexed approxi-

mately 95% of the Camp Taylor area. Blue Motor, subsequent to the judgment of annexation, made application to the city for a franchise covering the Camp Taylor area, but no franchise has been issued to it.

The Louisville Transit Company or its predecessor has furnished public transportation in the City of Louisville since 1890 under franchise from the city and certificate of public convenience and necessity from the proper regulatory agency of the state. In 1941 Transit purchased from the city, for a substantial consideration, a 20-year franchise under which it is now operating. By the terms of its franchise it is authorized to operate over all streets and highways of the city and is required to furnish city-wide transportation. Subsequent to the annexation judgment Transit applied to the city for authority to extend its service into the annexed portion of the Camp Taylor area. The requested authority was granted and since January, 1951, both Transit and Blue Motor have furnished transportation service in that area.

Blue Motor contends that by reason of the certificate which it holds from the Department of Motor Transportation authorizing such service, it has the right to maintain service in the same area it has served since 1935, regardless of the annexation proceedings by the city.

Transit argues that by reason of its franchise from the city and a certificate which it holds from the Department of Motor Transportation authorizing it to operate busses in the City of Louisville, it alone has the right to render such service within the city limits.

Before attempting to weigh these conflicting theories, we look briefly to those sections of the Constitution and statutes which may be applicable:

Kentucky Constitution, sections 163 and 164 as construed by this court in People's Transit Co. v. Louisville Railway Co., 220 Ky. 728, 295 S.W. 1055, confer upon cities the right of final decision as to whether a public utility may use or occupy the city streets for an intra-city service. Kentucky Constitution, section 3, contains, among other things, the provision that "every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment."

KRS 281.010(13) provides:

"(13) (a) A 'city bus certificate' means a certificate granting authority only for the operation of motor vehicles carrying passengers for hire between points within the corporate limits of a city and over regular routes.

"(b) A 'city bus' is a bus when being operated under one or more city bus certificates."

KRS 281.635(1) provides:

"Notwithstanding anything contained in this chapter:

"(1) All cities of the Commonwealth are vested with the power to sell franchises or, where no franchise is sold, grant authorizations for the operation of city busses over their streets and highways; provided, however, no person shall apply for or obtain any such franchise or authorization from any city without a prior finding by the department, after a hearing, that there is a demand and necessity for the service sought to be rendered, * * *. Upon certification by the department to such city that there is a demand and necessity for the service sought to be rendered, any city may award any duly qualified person a franchise or authorization covering the proposed operation. Upon acquiring such a franchise or authorization, the holder thereof shall apply to the Department of Motor Transportation for a city bus certificate which shall be issued to the holder of the franchise or authorization without a hearing."

KRS 281.665 provides:

"(1) Any bona fide motor carrier or its successor operating city busses as of December 31, 1949, under a valid certificate, franchise, statute, authorization, or in bona fide operation on said date, shall be entitled to such certificate or certificates and of such type or types as are defined in this chapter that cover their operations as of December 31, 1949." (This is the so-called "grandfather" statute upon which Blue Motor places much reliance.)

With these sections of the Constitution and statutes in mind, we look now to the authorization granted by the state to the opposing companies:

Transit, prior to 1950, held a common carrier certificate of public convenience and necessity issued by the Public Service Commisison in recognition of and as an incident of the franchise which it held from the City of Louisville. Following the Act of 1950 which created the state Department of Motor Transportation, that Department issued to Transit under the "grandfather" provisions of KRS 281.665 a city bus certificate as defined by KRS 281.010(13).

It should be noted that before 1950 the state issued only one type of certificate to motor carriers; i.e., a common carrier certificate without any distinction as to whether service rendered was within or without the corporate limits of a city. The 1950 Act authorized the Department to issue either a "city," "suburban," or "over-the-road" certificate, depending upon the type of service to be rendered. Hence, the last certificate issued to Transit was a city bus certificate in recognition of the type of service it renders.

Blue Motor, prior to 1950, also operated under a common carrier certificate, the certificate merely reading "from Louisville to Camp Taylor." Subsequent to the 1950 Motor Transportation Act, the Department issued to Blue Motor two certificates in lieu of its old common carrier certificate. One of the new certificates, covering territory outside the City of Louisville, was designated "suburban." The other certificate, which covers that part of Blue Motor's original territory which had been annexed by the city, was designated "city." These certificates also were issued in reliance upon the "grandfather" statute—KRS 281.665(1). The point is made that Blue Motor's new certificates were not issued until after Transit had already initiated bus service in the Camp Taylor area, but we do not regard the time element as significant. We think the rights of the parties became fixed as a matter of law when the Camp Taylor area was annexed in June, 1950.

We look now to what we consider the applicable law. It seems to us the logical starting point is the Kentucky Constitution, sections 163 and 164. It is clear from these two sections that the framers of the Constitution intended to confer upon cities the final right to decide whether a public utility may use or occupy the streets for an intra-

city service. As already mentioned, this court so held in the People's Transit Co. case, 220 Ky. 728, 295 S.W. 1055.

It is also apparent that the Legislature, in enacting the 1950 Motor Transportation Act, carefully refrained from encroaching upon this constitutional right of cities. For instance, it is provided in KRS 281.635 that notwithstanding anything contained in the Act "all cities of the Commonwealth are vested with the power to sell franchises or, where no franchise is sold, grant authorizations for the operation of city busses over their streets and highways * * *."

Moreover, there can be no doubt that Transit's franchise covers not only the territory within the boundaries of the city at the time the franchise was let, but also such additional territory as may from time to time be annexed by the city. In Truesdale v. City of Newport, Ky., 90 S.W. 589, 590, it was said "the limits of the city year by year determine the limits of the contract."

It must also be kept in mind that KRS 81.100 et seq.—formerly Kentucky Statutes, §§ 2760 and 2761, Acts of 1893—which authorize a city of the first class to annex adjacent territory were in full force and effect when Blue Motor first acquired its certificate from the state.

It is a familiar principle of constitutional law that constitutional and statutory provisions in effect at the time a contract is made become a part of the contract. City of Henderson v. Henderson Traction Co., 200 Ky. 183, 254 S.W. 332; Williams v. Nall, 108 Ky. 21, 55 S.W. 796; Deposit Bank of Owensboro v. Daviess County, 102 Ky. 174, 39 S.W. 1030, 44 L.R.A. 825; Armour Packing Co. v. United States, 209 U. S. 56, 28 S.Ct. 428, 52 L.Ed. 681; San Francisco-Oakland Terminal Rys. v. Alameda County, 66 Cal. App. 77, 225 P. 304; 12 Am. Jur. 769, section 240.

Opposed to this line of reasoning is the argument of Blue Motor which, briefly summarized, is this: The certificate of convenience and necessity which Blue Motor has operated under since 1935 is a special franchise equivalent to a contract between the certificate holder and the state. The rights granted by the certificate are property rights which cannot be impaired by subsequent action of the

state or an arm of the state. The Dartmouth College case, Trustees of Dartmouth College v. Woodward, 4 Wheat 518, 4 L.Ed. 629, familiar to all students of constitutional law, is cited on this point.

Blue Motor also points to the provision in KRS 281.635 (1) that no franchise shall be issued by a city without a prior finding by the Motor Transportation Department that there is a demand and necessity for the service sought to be rendered, and insists that in the absence of such certificate, Transit cannot, under any circumstances, properly extend its service into the Camp Taylor area. Transit admits, of course, that it did not obtain from the Department a certificate of convenience and necessity prior to the extension of its service.

It may be conceded that each of the theories presented in this case is a sound and logical principle of law when considered in the abstract. It is apparent, however, that both theories cannot have full application here. If each theory is projected to its logical conclusion the result, when applied to the facts of this case, is a "dead heat" so to speak, with a finding that both companies are entitled to maintain service in the Camp Taylor area. That, in effect, is what the Commissioner of Motor Transportation held, but this result would not be advantageous to the public or satisfactory to either of the companies. Consequently, we are faced not so much with the task of deciding which of the companies is right, but which of them has the superior right.

We think the rights of Transit are superior. Its rights come not only from the statutes, but from the Constitution. Conceding for the purpose of this discussion that the certificate which Blue Motor holds from the state has some of the attributes of a property right, that right is neither absolute nor irrevocable. Of some significance is the fact that the certificate must be renewed from year to year. Moreover, the original certificate was issued under a statute which was enacted subject to the constitutional provision which gives cities the final right to grant or to withhold permission to a utility to render an intra-city service using or occupying the city streets. At the time the original certificate was issued to Blue Motor the annex-

ation statute was in effect and even at that time there was a reasonable probability that the city would sometime in the future annex the Camp Taylor area. Hence, Blue Motor's certificate was issued subject to that contingency. When the area was annexed by the city it thereby was removed for most purposes from the jurisdiction of the state and was placed within the jurisdiction of the city. It follows that the rights of Blue Motor, which were derived from the state, must give way to the rights of Transit, which were derived from the city. It is pointed out by Blue Motor that a city is merely an arm of the state and that the city cannot do what the state itself cannot do. But that rule is not applicable here. The right of a city to control the letting of franchises to intra-city utilities is derived from the Constitution and to that extent the authority of the city is superior to that of the state.

The "grandfather" statute neither added to nor detracted from the rights of either company. That statute merely retained in status quo those rights which existed prior to December 31, 1949 by virtue of the old type certificates. Since Blue Motor had no authority to maintain intra-city bus service prior to December 31, 1949, the Department of Motor Transportation could not under authority of the "grandfather" statute confer such rights upon it.

If we were to uphold the right of Blue Motor to render bus service within the city limits of Louisville without first obtaining a franchise from the city, we would be in the anomalous position of approving something which is expressly prohibited by sections 163 and 164 of the Constitution. Not only that, but we would at least be required to modify the language used in People's Transit Co. v. Louisville Railway Co., and Truesdale v. City of Newport, referred to above. While the identical question with which we are now concerned was not before the court in those cases, we think the language of the opinions supports in principle Transit's position.

It is argued by Blue Motor that the hearing notice issued by the Department of Motor Transportation did not include the question of Blue Motor's right to render intra-

city service, and that issue should not have been decided by the Department. We find from the preliminary proceedings before the Department's examiner that there was at least an implied consent, if not an express agreement, that the purpose of the hearing was to determine the respective rights of both carriers to operate in the Camp Taylor area. The examiner so stated the issue at the commencement of the hearing and Blue Motor having acquiesced in that statement may not now complain of a defect in the hearing notice.

The contention that rights guaranteed to Blue Motor by the Federal Constitution have been violated has been considered and found not to be sustainable.

The judgment is affirmed.

Mandate

THE COMMONWEALTH OF KENTUCKY, THE COURT OF APPEALS

Spring Term, June 25, 1954

RAY WHITAKER, et al d/b/a Blue Motor Coach Lines

v.

LOUISVILLE TRANSIT CO., et al

and

CITY OF LOUISVILLE

v.

DEPARTMENT OF MOTOR TRANSPORTATION, et al

Appeal from a Judgment of the Franklin Circuit Court

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellees recover of the appellants their cost herein expended.

Judge Duncan dissents from the opinion insofar as it holds that extending the City boundaries destroyed Blue Motor's right to operate in the annexed area.

A copy—Attest:

ACREE AUSTIN, C. C. A.

By /s/ IRENE C. AUSTIN, D. C.

Issued January 11, 1955

APPENDIX B

Statutes Involved

Constitution of the Commonwealth of Kentucky

4 PROCEEDINGS AND DEBATES, KENTUCKY CONSTITUTIONAL CONVENTION (1891) 6024, 6041

Sec. 3. All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment.

Sec. 163. No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has, in good faith, been begun thereunder, the provisions of this section shall not apply.

Sec. 164. No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such mu-

nicipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.

Kentucky Revised Statutes (1954)

CHAPTER 81: CITY CLASSIFICATION, BOUNDARIES AND ANNEXATION[1]

81.100. *Annexation of unincorporated territory or reduction of territory by first-class city.*

The boundaries of cities of the first class[2] shall remain as established by law until changed as provided in KRS 81.100 to 81.130. Whenever a city of the first class desires to annex any unincorporated territory or to reduce the boundaries of the city, the city legislative body may enact an ordinance, defining accurately the boundary of the territory proposed to be annexed or stricken off. The ordinance shall be published in at least ten issues of the daily paper published in and having the largest circulation in the city. In not less than thirty days after the enactment of the ordinance, if the publication has been made and no petition has been filed in the circuit court as provided in KRS 81.110, the city legislative body may enact another ordinance annexing to the city or striking from the city the territory described in the ordinance. Upon the enactment of this ordinance, the territory shall become part of the city, or be stricken from the city.

81.110. *Protest against annexation of unincorporated territory or reduction of territory by first-class city; trial; judgment.*

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[1] Originally enacted as Kentucky Acts, 1893, c. 244, §§ 254-257. Numerous minor amendments have been made over the years by statute and by repeated re-codification. The current text, given above, is identical with that under which the annexation of the Camp Taylor area was accomplished in 1950, and is not materially different from the text in effect in 1935.

[2] Louisville is the only city of the first class, KRS (1954) § 81.010(1).

(1) Within thirty days after the enactment of an ordinance proposing to annex unincorporated territory to a first-class city, or to reduce its limits, one or more residents or freeholders of the territory proposed to be annexed or stricken off may file a petition in the circuit court of the county, setting forth the reasons why the territory or any part of it should not be annexed, or why the limits should not be reduced. Summons shall issue on the petition and be executed on the chief executive office of the city, and the answer of the city shall be filed within twenty days after service of the summons. The case shall be tried according to the practice prescribed for the trial of jury cases.

(2) If the jury finds, upon a hearing, that less than seventy-five percent of the freeholders of the territory to be annexed or stricken off have remonstrated, and that the adding or striking off of the territory will be for the interest of the city, and will cause no manifest injury to the persons owning real estate in the territory sought to be annexed or stricken off, the annexation or reduction shall be approved and become final. If the jury finds that seventy-five per cent or more of the resident freeholders of the territory sought to be annexed or stricken off have remonstrated, the annexation or reduction shall not take place, unless the jury finds from the evidence that a failure to annex or strike off will materially retard the prosperity of the city, and of the owners and inhabitants of the territory sought to be annexed or stricken off, in which case the annexation or reduction shall take place nowithstanding the remonstrance.

(3) An appeal from the judgment may be taken as in other cases, but there shall be no change of venue from the county. Costs shall follow the judgment.

(4) The judgment shall, when entered, be certified to the city legislative body, which may thereupon annex to or strike from the city the territory described in the judgment, and the territory shall then become, or cease to become, a part of the city.

Kentucky Revised Statutes (1950)

CHAPTER 281: MOTOR CARRIERS[1]

281.010. *Definitions.* As used in this chapter, unless the context requires otherwise,—

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(13)(a) A "city bus certificate" means a certificate granting authority only for the operation of motor vehicles carrying passengers for hire between points within the corporate limits of a city and over regular routes.

(b) A "city bus" is a bus when being operated under one or more city bus certificates.

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281.635. *City franchises for city busses; requirement of certificate; powers of cities to regulate bus operations; powers of cities concerning taxicabs; rate regulation.*

Notwithstanding anything contained in this chapter:

(1) All cities of the Commonwealth are vested with the power to sell franchises or, where no franchise is sold, grant authorizations for the operation of city busses over its streets and highways; provided, however, no person shall apply for or obtain any such franchise or authorization from any city without a prior finding by the Department, after a hearing, that there is a demand and necessity for the service sought to be rendered, which finding shall be valid and effective for a period of one year from and after the date thereof, exclusive of any delay due to the order of any court. Upon certification by the Depart-

[1] A general revision of the laws applicable to motor carriers was enacted as Kentucky Acts, 1950, c. 63, effective June 15, 1950. The excerpts given here are §§ 7(m), 14(a)-(c), 14(f)-(h) and 20. These provisions have not been changed since June 15, 1950, except that (a) § 281.010(13) was renumbered by Kentucky Acts (1954), c. 188, § 1, and is now designated § 281.010(14), (b) a new § 281.010(14)(c), dealing with license plates for city busses, was added by the same section, and (c) a number of additional subsections were added to § 281.665 by Kentucky Acts (1954), c. 188, § 6 dealing principally with certain special forms of transportation service. These changes do not appear to affect the questions presented in the case at bar.

ment to such city that there is a demand and necessity for the service sought to be rendered, any city may award any duly qualified person a franchise or authorization covering the proposed operation. Upon acquiring such a franchise or authorization, the holder thereof shall apply to the Department of Motor Transportation for a city bus certificate which shall be issued to the holder of the franchise or authorization without a hearing. Unless a certificate is exercised within one year from the grant thereof, exclusive of any delay due to the order of any court, the authority conferred by the issuance of the certificate of convenience and necessity shall be void.

(2) The applicant for a certificate or renewal of a certificate to operate a city bus shall at the time of application file with the Department a map or maps showing the route or routes and territory proposed to be served, together with a time schedule, and shall thereafter, during the license year, file only such additional maps or time schedules as the Commissioner may require.

(3) The governing body of any city of the first four classes in the Commonwealth in which city busses operate shall have supervisory and regulatory power over such city busses, while operating in such city, and shall have authority to enforce all ordinances or regulations pertaining to routes, services, time schedules and operation of said city busses and the drivers thereof, provided that any interested party may appeal to the Department from any action, finding or order of any such city within thirty days after the entry of such action, finding or order, and a hearing shall be held before the Department in the same manner as other hearings are held as provided for in this chapter; provided, however, that any such action, finding or order of any such city shall be sustained if there is substantial evidence or reason to support it; otherwise the Department shall make such orders as it deems necessary and proper. However, where a carrier's entire operation is confined to intracity transportation within the corporate limits of a single city, there shall be no appeal to the Department from the actions, findings or orders of such a

city. Provided further, that where any city bus is subject to the regulatory powers of more than one city and such regulations are in conflict or such as to impede the transportation facilities serving such cities, or the carrier is failing to furnish safe, adequate and convenient service to the public, the Department may, upon complaint or on its own initiative, call a hearing and enter such orders as are necessary and proper.

• • •

(6) Until such time as any city of the Commonwealth enacts such ordinances or prescribes such rules and regulations as may be reasonably necessary to exercise the prior powers herein delegated to such cities respecting the supervision and regulation of city busses, taxicabs and taxicab drivers, the Department shall possess such powers and may, by regulation, prescribe such rules as may be reasonably necessary to supervise and control city busses, taxicabs and taxicab drivers, having regard for the public safety and the public need for service.

(7) If any city fails to exercise any of the authority granted it herein, such authority shall be vested in the Department.

(8) The power to regulate rates fixed by agreement with a city. The Department may, under the provisions of this chapter, originate, establish, change, promulgate and enforce any rate that has or may be fixed by any contract, franchise or agreement between the holder of any city bus certificate and any city, and all rights and obligations arising out of such contract regulating any such rate shall be subject to the jurisdiction and supervision of the Department, but no such rate shall be changed nor any contract, franchise or agreement affecting it be abrogated or changed until a hearing has been had.

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281.665. *Grandfathering of city bus operations, and of certificates and permits.*

(1) Any bona fide motor carrier or its successor operating city busses as of December 31, 1949, under a valid cer-

tificate, franchise, statute, authorization, or in bona fide operation on said date, shall be entitled to such certificate or certificates and of such type or types as are defined in this chapter that cover their operations as of December 31, 1949.

(2) Any holder of any other type of valid certificate or permit issued prior to June 15, 1950, shall be entitled, upon renewal, to such certificates or permits, as the case may be, that will grant the holder thereof the same authority that the certificates or permits held on June 15, 1950 granted.

(3) All certificates or permits grandfathered shall be subject to the same limitations and restrictions as were imposed on such certificate or permit, and if the validity of any certificate or permit issued by the Division of Motor Transportation was in litigation on December 31, 1949 and is finally held to be invalid, then such certificate or permit shall not be grandfathered.